

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
 v.)
)
 TYSON FOODS, INC., et al.,)
)
 Defendants.)

Case No. 05-CV-00329-GKF-SAJ

**THE STATE OF OKLAHOMA'S MOTION TO COMPEL DEFENDANT PETERSON
FARMS, INC. TO PRODUCE A PROPERLY PREPARED 30(b)(6) DESIGNEE FOR
DEPOSITION AND TO ALLOW FULL QUESTIONING OF THAT DESIGNEE, AND
INTEGRATED BRIEF IN SUPPORT**

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COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and, pursuant to Federal Rule of Civil Procedure 37, moves this Court for an order compelling Defendant Peterson Farms, Inc. ("Defendant Peterson") to produce a properly prepared 30(b)(6) designee for deposition and to allow full questioning of that designee. In support of its Motion, the State states as follows:

I. Introduction

Defendant Peterson produced an unprepared designee in response to the State's 30(b)(6) deposition notice. Additionally, Defendant Peterson improperly objected and improperly instructed the designee not to answer questions in violation of Federal Rule of Civil Procedure 30(d)(1). In short, the actions of Defendant Peterson counsel interfered with the State's legitimate discovery efforts and wasted the State's time. Accordingly, the State brings this motion to compel Defendant Peterson to produce a properly prepared designee to testify to subjects 3 through 34 of the State's 30(b)(6) deposition notice, *see* Ex. 1, and to allow full examination of the designee without improper objections or instructions by Defendant Peterson. Additionally, the Plaintiff requests that this Court award all such additional relief in favor of the State as may be appropriate under Federal Rule of Civil Procedure 37.

II. Legal Standard

The law is clear: "To fully satisfy the [Rule 30(b)(6)] request . . . the corporation must sufficiently 'prepare [the designee] so that [the designee] may give complete, knowledgeable and binding answers on behalf of the corporation.'" *Cupp v. Edward D. Jones & Co., L.P.*, 2007 WL 982336, *1 (N.D. Okla. Mar. 29, 2007) (citation omitted); *see also Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1418 (D. Nev. 1995) ("In producing representatives for a Rule

30(b)(6) deposition, a corporation must prepare them to give 'complete, knowledgeable and binding answers'") (citation omitted). As explained in *Payless Shoesource Worldwide, Inc. v. Target Corp.*, 2007 WL 1959194, *1 (D. Kan. June 29, 2007):

"With regard to choosing a deponent to speak on behalf of the corporation, companies 'have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them fully to unevasively answer questions about the designated subject matter.'" This duty does not require personal knowledge of the subject matter, but rather "implicitly requires persons to review all matters known or reasonably available to [the corporation] in preparation for the 30(b)(6) deposition." Thus, "to avoid liability, the noticed party must designate persons knowledgeable in the areas of inquiry listed in the notice."

(Citations omitted.) As one court astutely noted, "the responding party 'must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.' Any other interpretation of the Rule would allow the responding corporation to 'sandbag' the deposition process." *Ice Corp. v. Hamilton Sundstrand Corp.*, 2007 WL 1732369, *4 (D. Kan. June 11, 2007) (citation omitted).

Defendants should not be permitted to "sandbag" the deposition process by refusing to produce a fully knowledgeable designee. That preparing such a witness is burdensome is of no consequence. *See id.* ("That such depositions could be onerous to the corporation-party makes little difference"). "[T]he burden upon such a responding entity is justified since a corporation can only act through its employees." *Id.* Indeed, "[f]oremost among the purposes of this Rule is to 'curb the 'bandying' by which officers and managing agents are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization, and thereby it." *Starlight International Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999) (citations omitted); *see also Rainey v. American Forest & Paper Association*, 26 F.Supp.2d 82, 95 (D.D.C. 1998); *United States v. Taylor*, 166 F.R.D. 367, 367-68 (M.D.N.C. 1996).

The rules pertaining to objections and instructions at a 30(b)(6) deposition are no different than the rules for any other deposition. *See* Fed. R. Civ. P. 30(c). Federal Rule of Civil Procedure 30(d) provides: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court or to present a motion under Rule 30(d)(4)." (Emphasis added); *see also State Farm Mutual Automobile Insurance Co. v. Dowdy*, 445 F.Supp.2d 1289, 1292 (N.D. Okla. 2006) (objections); *Fondren v. Republic American Life Insurance Co.*, 190 F.R.D. 597, 600-01 (N.D. Okla. 1999) (objections and instructions); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (instructions).

Finally, it is important to note that it is entirely permissible to ask the designee questions beyond the scope of the 30(b)(6) deposition notice, and such questions are not a basis for objection. As explained in *Payless Shoes*, 2007 WL 1959194, *1, "when the party objects to the questions posed by the examining party as outside the scope of matters noticed in Rule 30(b)(6) 'the general deposition rules govern (i.e. Fed. R. Civ. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).'" (Citation omitted.)

III. Facts

On July 26, 2007, the State took the deposition of Defendant Peterson's 30(b)(6) designee, Mr. Kirk Houtchens.¹ Throughout the course of the deposition, Defendant Peterson's 30(b)(6) designee repeatedly demonstrated that he was unprepared and / or not permitted to testify regarding subjects properly noticed, including specifically subjects 6, 7, 11, 12, 14, 15, 16,

¹ A copy of the 30(b)(6) deposition notice, as amended on July 16, 2007, is attached as Exhibit 1.

17, 18, 20 and 22. Moreover, Defendant Peterson repeatedly engaged in disruptive conduct precluding the State from obtaining relevant and necessary testimony in this action.

By way of example, Defendant Peterson's designee was unprepared to testify regarding subject number 6 from the 30(b)(6) deposition notice. Subject number 6 asks Defendant Peterson to provide testimony regarding "[t]he number, size, and location of poultry houses / barns, past and present, at your poultry growing operations within the IRW." Ex. 1. The transcript reveals that not only did Mr. Houtchens not know this information, but also no attempt was made by Defendant Peterson to prepare the designee to testify as to information requested in subject 6. For example:

Q: Okay. And using that record and the individual grower history, which was Exhibit 4 to the deposition, couldn't someone have produced totals, total number of birds in the Illinois River Watershed, total number of houses in the Illinois River Watershed?

A: I'd only be speculating. I -- I'm not in data processing.

Q: Well, did --

A: I'm not sure how they can do that.

MR. McDANIEL: You mean as of today? I mean, ask him a question he can answer. Today?

MR. RIGGS: Yeah.

MR. McDANIEL: Last year? Two years ago?

MR. RIGGS: He said he couldn't answer then, but I'll do it that way.

Q: (Mr. Riggs continued.) Could you do that for 2002?

A: I don't know if we can or not.

Q: Could you do it for 2003?

A: I'm not aware of it.

Q: Could you do it -- could you have done it for 2004?

A: I don't believe we have.

Q: Could you have done it for 2005?

A: No.

Q: Could you have done it for 2006?

A: No.

Q: Could you have asked someone to do that, someone in the company?

A: I suppose we could.

Ex. 2 (July 26, 2007 Houtchens Dep., 33:1-34:3).

Similarly, Defendant Peterson's designee was unprepared to testify regarding subject number 7 from the 30(b)(6) deposition notice. Subject number 7 asks Defendant Peterson to

provide testimony regarding "[t]he number and kind of birds raised in the IRW each year by you or poultry growers under contract with you." Ex. 1. The transcript again reveals that not only did Mr. Houtchens not know this information, but also no attempt was made by Defendant Peterson to prepare the designee to testify as to information requested in subject 7.

Q: Are you here to testify about the number of and kind of birds raised in the Illinois River Watershed each year by you or your growers under contract?

MR. McDANIEL: He is. The company's designated him on that topic.

* * *

Q: (Mr. Riggs continued.) Well, do you have the total number for the Illinois River Watershed, total number of birds produced by the company?

A: No, not today.

Q: Did you look for that?

A: No.

Q: Why not?

A: I was instructed that all that information had been previously sent to the plaintiff.

Q: Who told you that?

A: Counsel.

Ex. 2 (July 26, 2007 Houtchens Dep., 16:15-19, 17:15-25).

Additionally, Defendant Peterson's designee was unprepared and / or not permitted to testify regarding subject number 11 from the 30(b)(6) deposition notice. Subject number 11 asks Defendant Peterson to provide testimony regarding "[t]he amount of poultry waste generated by each and all of your poultry growing operations within the IRW on an annual basis." Ex. 1. The transcript plainly reveals Defendant Peterson's obstructionist objections and instructions interfering with the State's inquiry on information directly related to the subject at hand:

Q: Number 11 says, "The amount of poultry waste generated by each and all of your poultry growing operations within the IRW on an annual basis." And to clarify that, since I believe your counsel takes issue with how we use the phrase "growing operations," I'm referring to any birds you own, regardless of where they're -- and who raises them -- where they're raised and who raises them. So we're interested in the amount of poultry waste -- waste generated by those birds in the Illinois River Watershed annually.

MR. McDANIEL: Wait just a second. Let me interpose an objection. We also object to the -- your use of the term "poultry waste." I included it in my written objections. And just for the record here, the way the plaintiffs used that term, object to was overly broad, argumentative, and -- and vague. So to avoid having

to interrupt you every time you use the term, if you'll agree that that one objection will do for the deposition, I'll say it once and be done with it.

MR. RIGGS: I'll agree with that -- that you had objection to this standing objection --

MR. McDANIEL: Okay.

MR. RIGGS: -- when we use the term. Let's go ahead and talk about that then.

* * *

Let me hand you Exhibit No. 6. (Wherein, Plaintiff's Exhibit 6 was marked.)

Q: I'll represent to you, Mr. Houtchens, that these three pages are the definition section in the Oklahoma Registered Poultry Feeding Operations Act. Have you ever read that Act before?

A: No, sir.

Q: I assume, therefore, you never read the definitions section of the Act. Is that correct?

A: Yes, sir.

Q: Would you look at item No. 21 under the definition section?

MR. McDANIEL: David, tell me where you have designated a topic that would require Peterson Farms to produce a witness to provide interpretations of Oklahoma Statutes and Regulations.

MR. RIGGS: We talked about --

MR. McDANIEL: If you can't, he isn't answering the question.

MR. RIGGS: We're talking about poultry waste and your objections to the term. And he's the guy that's supposed to be talking to us about that. It's listed in here.

MR. McDANIEL: Well, it's improper for you to try to take a fact witness to create a disagreement with that witness' lawyer who's stating a legal position. And I'm not -- that's improper, and we're not going there.

Q: (Mr. Riggs continued.) Well, would you answer my question? Would you read item No. 21 into the record?

MR. McDANIEL: You can read it. Go ahead.

A: "Poultry waste means poultry excrement, poultry carcasses, feed waste, or any other waste associated with the confinement of poultry from a poultry feeding operation."

Q: (Mr. Riggs continued.) Did you know that that was the definition under the law of poultry waste in the State of Oklahoma?

MR. McDANIEL: Object to the form. We're not answering questions from the statute.

Q: (Mr. Riggs continued.) I believe you said no. Is that right.

A: MR. McDANIEL: I said we're not answering the questions.

Q: (Mr. Riggs continued.) Are you not going to answer my question about whether or not you knew that was the definition of poultry waste in Oklahoma?

MR. McDANIEL: I told you we're not answering questions. I'm directing him not to answer the question. You can -- you can answer his question, and that is, whether or not you will answer his question. And then stop.

A: No.

Ex. 2 (July 26, 2007 Houtchens Dep., 42:3-43:1, 49:19-51:20) (emphasis added).

Moreover, the State's effort to elicit testimony regarding subject numbers 12, 14, 15, 16, 17, and 18 on the 30(b)(6) notice of deposition was hindered by Defendant Peterson's conduct.

The subjects at issue were:

12. Industry practice and your contract poultry growers practice regarding handling, storage, and spreading on land of poultry waste.
14. Knowledge or awareness of the run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations on which poultry waste generated by your poultry growing operations within the IRW has been stored, spread on or disposed of.
15. Knowledge or awareness of the run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations on which poultry waste has been stored, spread on or disposed of.
16. The environmental and human health effects / impacts of run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations within the IRW on which poultry waste generated by your poultry growing operations has been stored, spread on or disposed of.
17. The environmental and human health effects / impacts of run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations on which poultry waste has been stored, spread on or disposed of.
18. The efforts undertaken by you, directly or indirectly, to evaluate and / or quantify any environmental and human health effects / impacts of run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations within the IRW on which poultry waste generated by your poultry growing operations has been stored, spread on or disposed of.

Ex. 1. Not only does the transcript reflect that Mr. Houtchens had not been properly prepared on these subjects, but also it too contains a number of examples of Defendant Peterson making inappropriate objections and instructions aimed at interfering with the State's ability to obtain the designee's testimony and creating confusion during the proceeding.

Q: Still dealing with Exhibit No. 7, let me ask you to turn to page 629.²
Under the heading -- whoops. I'll give you time to get there.

² Exhibit No. 7 to the deposition is a document entitled "Poultry Water Quality Handbook." See Ex. 3. This document was distributed by Defendant Peterson to its growers. *Id.* It addresses central issues in this case. Despite this fact, and evidencing the lack of

A: Okay.

Q: "Pollution is Not Inevitable." The handbook says, "Poultry growers, whether their operation is consolidated or diversified, need not produce any pollution outside the system. Pollution occurs only when litter is mismanaged - for example when it is land applied in quantities that exceed plant needs, or when the ground is wet or frozen." Do you agree with that statement?

MR. McDANIEL: Object to the form. That's a scientific question. You want to tell me where he's designated to testify about the science in this case of what pollution is or isn't?

Q: (Mr. Riggs continued.) I'm asking you if you agree with that statement I just read to you about what happens when poultry waste is mismanaged.

MR. McDANIEL: And I've asked you to identify where the plaintiff have -- have requested Peterson to prepare a witness to testify on that point.

A: It would be hard to --

MR. McDANIEL: Hold on just a second.

MR. RIGGS: Number 12, Industry Practice --

MR. McDANIEL: See, he gets to answer the next question.

THE WITNESS: Oh, okay.

MR. RIGGS: "Industry practice and your contract poultry growers practice regarding handling, storage, and spreading of land on poultry waste," for one. "Knowledge or awareness of the run-off/discharge/release of poultry waste from land." Well, that's precisely what this is about. Number 14, No. 15, No. 16, No. 17, No. 18, all of those cover that question.

Q: (Mr. Riggs continued.) Will you please answer it?

MR. McDANIEL: No. Hold on. Those -- those topics ask regarding practices of Peterson's contract growers awareness or knowledge of run-off, etc., from a Peterson Farm. You're asking conceptual, technical scientific questions of this witness. That's my objection. And we're not going to answer those.

MR. RIGGS: Item No. 15 doesn't refer to Peterson at all. Item No. 14 doesn't. I don't think item No. 16 or 17 does.

MR. McDANIEL: Knowledge, awareness of the run-off. We're not going to talk hypotheticals. He's not a technical expert. We're not going to do that today, David.

MR. RIGGS: Okay. Well --

MR. McDANIEL: He hasn't been qualified. Peterson doesn't have to present a technical expert, and you haven't specified a topic that would require him to give conceptual answers.

MR. RIGGS: The topics I named ask for his knowledge or awareness of what is precisely discussed in this section of the handbook they gave their growers. How could that not be covered by this deposition?

MR. McDANIEL: No. You -- you can't rewrite your topics. They're in black and white. And it says the run-off --

MR. RIGGS: Okay.

Defendant Peterson's failure to adequately prepare for the deposition, the designee testified that he had never seen this exhibit. Ex. 2 (July 26, 2007 Houtchens Dep., 51:23-52:11).

MR. McDANIEL: -- discharge. You haven't asked him that question. If you do, I won't object. But you can't throw some broad thing out there and expect someone to come in and answer technical questions from a multi-page report.

Q: (Mr. Riggs continued.) Do you agree that pollution occurs when litter is mismanaged?

MR. McDANIEL: Object to the form.

A: In what way would that be mismanaged?

Q: (Mr. Riggs continued.) Well --

A: This specifically.

Q: -- this gives you examples, when it's land applied in quantities that exceed plant needs or when the ground is wet or frozen. Under those examples.

MR. McDANIEL: No. We're not answering those questions.

Q: (Mr. Riggs continued.) Do you agree that litter is mismanaged if it is land applied in quantities that exceed plant needs?

MR. McDANIEL: That's -- again, that's a technical question that -- that you haven't specified in your topics, so we haven't prepared someone to answer those kind of questions, so . . .

MR. RIGGS: Are you directing him not to answer that question?

MR. McDANIEL: Yes, I am.

Q: (Mr. Riggs continued.) Are you not going to answer that question?

A: Under counsel's advice.

Q: Okay. Are you not going to answer the question I asked immediately before that under the advice?

A: No. Under his advice I'm not going to answer.

MR. McDANIEL: Yes, he's not going to testify.

MR. ELROD: This sounds like a professional hearing.

MR. RIGGS: Reminds me of the one -- well, I won't say that.

Q: (Mr. Riggs continued.) The statement in the handbook goes on to say, "As a result of such applications, potentially contaminated substances become 'available' to the environment. If they also become 'detached' from the site, for example, by being absorbed to sediments or dissolved in water, they can be 'transported' off site. Transport occurs when contaminants in the animal waste (the unused nutrients, bacteria or other elements in the litter) are released to surface drainage or infiltrate beneath the soil surface in groundwater recharge areas." Do you agree with that statement?

MR. McDANIEL: It's not a designated topic for this witness, plus he's told you he's not familiar with the document. We're not answering that question.

Q: (Mr. Riggs continued.) Are you not going to answer that question?

A: Yes.

Q: Did you know that bacteria are contained in poultry manure?

A: Yes.

Q: For how long have you known that?

A: Never thought of that. I just really don't know.

Q: Do you know if the company is aware that bacteria are contained in poultry manure?

A: I assume we do, yes.

Q: Do you know how long the company's known bacteria are contained in poultry manure?

A: No, sir. I do not know.

Q: Do you know that these bacteria can run off the land during rainfall, along with other constituents of poultry waste which has been spread on the land?

MR. McDANIEL: Object to the form. I still -- I -- I don't see where you've covered this by any topic asking him to answer broad, general, technical questions about patent transport of constituents in the environment. He's not here as an expert witness.

MR. RIGGS: I'm not giving terms about patent transport, I'm using common terms that are used in the handbook, run-off from the land, and it comes under No. 14, 15, 16, and 17.

MR. McDANIEL: Those questions don't go to the run-off. You're asking conceptual questions that you haven't asked us to prepare a witness for.

MR. RIGGS: These questions are about the company's knowledge or awareness of this phenomenon of these constituents running off the land where manure has been land applied.

MR. McDANIEL: Okay. That's maybe -- you could have written that topic and we could have objected to --

MR. RIGGS: It is the topic. I read it.

MR. McDANIEL: No. I don't see the phenomenon in -- anywhere in your list of topics. You can't rewrite your notice in your deposition.

Q: (Mr. Riggs continued.) Are you not answering my question about the company's knowledge that bacteria can run off the land during rainfall where poultry waste has been spread?

MR. McDANIEL: That's -- that's so hypothetical and unfair. If it was a -- if there a Ph.D. sitting here I would object.

Q: (Mr. Riggs continued.) My question is, are you not going to answer that question?

A: Yes.

* * *

Q: Let's look at page 630 of the Poultry Water Quality Handbook. There it says -- if I can find the place. Under the heading Nutrients and Salts, "Poultry manure is a valuable nutrient for grain and fiber crops, forage crops, fruit, and vegetables. However, if manure, litter, dead birds, (as compost or as buried carcasses) and/or wastewater are not properly protected and utilized, water contamination can occur from the release of excess nitrogen and phosphorus into the environment." Do you agree with that statement?

A: Yes, I do.

Q: Skipping on down, it says -- it's one full paragraph below that. "When nitrogen and phosphorus concentration in waterbodies rise too high, algae and rooted aquatic plants take over, prematurely aging and choking the waterbody and creating undesirable conditions - odors, offensive taste, and discoloration - all of which can make the water unfit for consumption or recreational and aesthetic use. Further, these eutrophic conditions can kill fish, clog water treatment plant filters and lead to the growth of blue-green algae, a species that can be fatal to livestock." Did you know that?

MR. McDANIEL: Object to the form.

Q: (Mr. Riggs continued.) Algae.

MR. McDANIEL: Object to the form. My prior objection. It's outside the scope of his testimony. You're not going to make your technical case through this witness. We're not answering that question.

Q: (Mr. Riggs continued.) Are you refusing to answer the question?

A: Yes.

* * *

Q: (Mr. Riggs continued.) Let's look under the right-hand column on page 630 where it says "Microorganisms." Under that heading it says, "Desirable and undesirable microorganisms live in our environment. Animal waste is a potential source of some 150 disease-causing organisms or pathogens. These organisms include bacteria, viruses, fungi, protozoa, and parasites. Examples of undesirable microorganisms include Salmonella, Cryptosporidium, Giradia, Listeria, coliform, New Castle (virus) ringworm, coccidiosis, and Ascaris. "When found in water or wastes, these pathogens pose significant threats to humans and other animals. They can infect humans and animals through drinking water, contact with the skin, or consumption of fish or other aquatic animals. Most pathogens die relatively quickly. However, under the right conditions, they may live long enough" -- "they may live enough to cause problems. They may persist longer in groundwater than in surface water." Do you understand what the word pathogen means in that context?

MR. McDANIEL: Object to the form.

A: Yes, I do.

THE VIDEOGRAPHER: Excuse me, Counsel. We have about three minutes on the tape.

MR. RIGGS: Okay.

Q: (Mr. Riggs continued.) Do you agree with the statement I just read regarding pathogens in animal waste?

MR. McDANIEL: Object to the form, and I incorporate my prior objection. It's outside the scope of his -- any designated testimony from Peterson Farms, plus it's extremely compound. We're not answering that question.

Q: (Mr. Riggs continued.) Let's go back to Exhibit No. 1. First of all, are you not going to answer that question?

A: Yes.

Q: (Mr. Riggs continued.) Mr. Houtchens, I want to direct your attention to one more reference in the Water Quality Handbook that Peterson provided its growers. On page 644, about the third or fourth paragraph down it says, "Phosphorus." Whoops, I'll give you time to find it.

A: Okay.

Q: Got it? It says, "Phosphorus-laden soil or dissolved phosphorus can move via runoff into the rivers, lakes and streams, where it causes excessive plant and algae growth, which in turn depletes the dissolved oxygen content in the water. Phosphorus-enriched waters contribute to fish kills and the premature aging of the waterbody. In the end, the beauty and the use of the waters are seriously curtailed. Even relatively small soil losses may result in significant nutrient depositions in the water." Do you understand how the word phosphorus is used in that context?

MR. McDANIEL: Object to the form. I think we've already stated our objections to the use of the term phosphorus.

Q: (Mr. Riggs continued.) Do you understand how it was used in that context?

A: Yes, I do.

Q: Do you understand how the word runoff is used in that context?

MR. McDANIEL: I object to the form.

A: Yes, I do.

Q: (Mr. Riggs continued.) Do you agree with the statement I just read from the Water Quality Handbook?

MR. McDANIEL: I'll object to the form. It's outside the scope of his designation, so Peterson Farms isn't going to answer that question.

Q: (Mr. Riggs continued.) Do you refuse to answer that question?

A: Yes.

Ex. 2 (July 26, 2007 Houtchens Dep., 59:19-66:8, 67:14-68:20, 70:20-72:5, 73:14-74:25)

(emphasis added).

As a final example, Defendant Peterson's improper conduct with respect to this deposition is revealed in the testimony and exchanges surrounding subject numbers 20 and 22 of the 30(b)(6) deposition notice. These subject numbers ask Defendant Peterson to provide testimony regarding:

20. Practices, policies and procedures, past and present, pertaining to the management, handling, storage, transportation, sale, trading, spreading on land, disposition, and disposal of poultry waste generated by your poultry growing operations in the IRW.
22. Best management practices for the handling, storage, transport, use or disposal of poultry waste generally and in the IRW specifically and the effectiveness of best management practices in preventing runoff / discharge / or release of poultry waste or the constituents of those into the waters of the IRW.

Ex. 1. The transcript not only reveals that Mr. Houtchens was not properly prepared on these subjects, but also again contains numerous examples of Defendant Peterson making improper objections and instructions, thereby interfering with the State's efforts to obtain testimony from the designee:

Q: Hand you Exhibit No. 12. (Wherein, Plaintiff's Exhibit 12 was marked.) This is a four-page exhibit dated March of 1988 entitled, Agricultural Land Use, Nutrients, and Water Quality in Benton and Washington Counties, Martin Maner,

Arkansas Department of Pollution Control & Ecology. Do you know who Martin Maner is?

A: No, sir, I don't.

Q: Take a look at this four-page document and then after you've had a chance to look at it, tell me if you have ever seen it before.

A: No, I have never seen this before.

Q: Okay. According to the document itself, it is dealing with water quality in two Northwest Arkansas counties, Benton and Washington Counties. Do you agree that a major part of the Illinois River Watershed is in Benton and Washington Counties?

A: Yes, I agree.

Q: At the bottom of page 1 it says, according to the 1982 data, there are 641,100 acres of farmland in this two county area. And then it says, "Thus, nitrogen and phosphorus loading can be calculated as follows." And then he sets forth these assumptions that underlie his study. I'll give you a minute to look as those. The assumptions deal with the amount of farmland available for spreading litter and what's in the litter and that sort of thing. Just take a look at those first. (Witness looks at document.) Okay. Then it has a calculation of the annual nitrogen Load and the annual phosphorus load for the available farmland in Benton and Washington Counties. That means available for receiving poultry litter. And I'm leading to this, those assumptions and calculations are followed by the statement, "Nitrogen and phosphorus should be applied at a rate not greater than what cover plants can assimilate." Do you agree with that statement?

MR. McDANIEL: Which statement? Just that one phrase?

MR. RIGGS: Nitrogen and phosphorus should be applied at a rate not greater than what cover plants can assimilate.

MR. McDANIEL: Object to the form.

A: I think that's -- that's proper management. I think that's correct.

Q: (Mr. Riggs continued.) And then it says right after that, "General guidelines for phosphorus are about 40 pounds per acre per year, and the current application rate is probably in excess of 80 pounds per acre per year." It then says, "These rates assume the material is spread evenly over all the available area, which is unlikely. Thus higher rates than these are probable." Were you aware of that?

MR. McDANIEL: Object to the form. You haven't designated or requested Peterson to provide a witness to testify about technical articles that, apparently, aren't even in their files, so we're not going to answer that question.

MR. RIGGS: Well, this has to do with knowledge and awareness of the company of these very issues. And --

MR. McDANIEL: You pulled an excerpt out of a technical report the man said he's never seen.

MR. RIGGS: It's in --

MR. McDANIEL: He's not going to interpret.

MR. RIGGS: It's the -- it's the complete report, and I'm trying to find out if anybody in the company knows anything about it. It's from the Arkansas Department of Pollution Control and Ecology, so it's not just some stray article, some -- someone wrote but didn't have a basis.

MR. McDANIEL: David, there's no foundation for anything you just said. The man hasn't seen it, he's not -- he's not --

MR. RIGGS: I'm asking --

MR. McDANIEL: -- here to interpret articles --

MR. RIGGS: -- you to take your time and read it.

MR. McDANIEL: Peterson Farms witness is not going to answer these questions. It is an improper examination. If you disagree with me, you can take it to the judge.

MR. RIGGS: Yeah.

MR. McDANIEL: He's not going to answer the question.

MR. RIGGS: Okay. Let me ask the witness.

Q: (Mr. Riggs continued.) Are you refusing to answer not only that question but any other questions about the Maner report made in 1988 regarding nitrogen and phosphorus loading in these two counties?

A: Yes.

Q: Your [sic] are speaking on behalf of the company when you're saying you do not have knowledge of this article I'm referring to by Martin Maner in 1988?

A: Yes.

Q: On page 3, at the top it says Schedule of Activities. The first after the Welcome is something called Workshop, Phosphorus Management for Agriculture and Water Quality by Andrew Sharply, USDA. Have you ever heard of Dr. Andrew Sharply?

A: No, I haven't.

Q: So you wouldn't know whether he's a reliable authority on the topic of this workshop Phosphorus Management For Agriculture and Water Quality?

A: No, I wouldn't.

Q: Do you speak for the company when you're saying that, that the company doesn't know of Andrew Sharpley?

MR. McDANIEL: The company isn't here to take the position on the credibility of any scientist. They weren't asked to, nor did they prepare a witness to do that.

Q: (Mr. Riggs continued.) My question is, do you know -- does the company know who Andrew Sharpley is?

MR. McDANIEL: The company's not here to take a position on that.

A: As far as I'm aware of, the company does not know.

Q: (Mr. Riggs continued.) Yeah. I'm trying to inquire about the company's knowledge about these issues which was expressly put in the directions to you to be prepared.

MR. McDANIEL: No.

Q: (Mr. Riggs continued.) Do you understand that?

MR. McDANIEL: No, don't -- and don't argue with the witness about that.

MR. RIGGS: I'm making a statement and asking him if he understands that.

MR. McDANIEL: It's a misleading statement. There isn't anything --

MR. RIGGS: Make your objection for the record.

MR. McDANIEL: I will if you'll.

MR. RIGGS: Yeah, you're --

MR. McDANIEL: -- hang on to it a minute.

MR. RIGGS: But you're going to coach the witness, and you know you're not do that.

MR. McDANIEL: I'm not coaching. I'm --

MR. RIGGS: That's exactly what you're doing.

MR. McDANIEL: -- having a problem with the fact --

MR. RIGGS: You're telling him, "Don't answer the question, and here's why." You just need to make your records.

MR. McDANIEL: All right, David. You're asking questions unfairly. You're arguing and essentially harassing the witness trying to ask him to answer questions that are not specified. You show me on your notice where he is to come prepared to talk about some 1993 study that bears no recognizable Bates stamp, don't even know where it's been produced, and then ask him if Peterson Farms has an opinion about the credibility of a particular scientist. You know it's improper, and I'll make my record.

MR. RIGGS: It's not improper. It's about a very prominent Arkansas Water Resources Center conference and this is an industry that, obviously, ought to be concerned, of interest in these matters, and they should have some knowledge of these things, and that's what we're here to find out, if the company cares enough to know anything about what's going on in the field.

MR. McDANIEL: Well, that's all argument. It's interesting. I move to have it stricken.

MR. RIGGS: Well --

MR. McDANIEL: I told you the company is not going to answer that question because you didn't --

MR. RIGGS: Are you --

MR. McDANIEL: -- properly request on the --

MR. RIGGS: -- telling him not to answer a any questions about the Arkansas Water Resources Center Conference Focus on Phosphorus?

A: Yes.

Ex. 2 (July 26, 2007 Houtchens Dep., 108:1-111:20, 126:3-129:2) (emphasis added).

These are merely examples of the lack of preparation of Defendant Peterson's 30(b)(6) designee to testify regarding matters properly noticed and the obstructionist tactics of Defendant Peterson during the course of the deposition. Counsel for the State urge the Court to review the full transcript of the deposition to understand the full nature of Defendant Peterson's failure to comply with the letter and the spirit of the Federal Rules of Civil Procedure.

IV. Argument

As demonstrated above, the record has a number of examples of where Mr. Houtchens, Defendant Peterson's designee, was not properly prepared to "give complete, knowledgeable and

binding answers on behalf of the corporation" to questions on subjects identified in the State's 30(b)(6) deposition notice. *See, e.g.*, Ex. 2 (July 26, 2007 Houtchens Dep., 16:15-19, 17:15-25, 33:1-34:3). This violates the letter and the spirit of the Federal Rules. *See, e.g.*, *Cupp*, 2007 WL 982336, *1; *Nevada Power*, 891 F.Supp. at 1418; *Payless Shoesource*, 2007 WL 1959194, *1; *Ice Corp.*, 2007 WL 1732369, *4. The State is entitled to straightforward answers from Defendant Peterson on subjects such as the number of birds it has had in the watershed, its knowledge of the run-off or release of poultry waste (or any constituents thereof) from land on which poultry waste has been stored, spread on or disposed of, and its knowledge of the environmental and health effects of such poultry waste run-off and releases. These are core issues in the State's case.

The record is likewise full of improper objections and instructions by Defendant Peterson. *See, e.g.*, Ex. 2 (July 26, 2007 Houtchens Dep., 51:6-20, 61:4-10, 62:20-21, 63:4-14, 64:8-11, 65:24-66:8, 68:17-20, 71:25-72:5, 74:21-25, 110:6-7, 111:4-16, 127:15-24, 128:22-129:2). Plainly, Defendant Peterson's objections and instructions were improper. *See, e.g.*, Fed. R. Civ. P. 30(c); *Dowdy*, 445 F.Supp.2d at 1292; *Fondren*, 190 F.R.D. at 600-01; *Dabney*, 73 F.3d 262 at 266. They obstructed the deposition and have unfairly prejudiced the State in its trial preparations.

Simply put, Defendant Peterson was required under the rules to produce a fully knowledgeable designee to testify on the subjects identified in the State's 30(b)(6) notice. It did not do so. In particular, Defendant Peterson failed to "provide a witness who can answer questions regarding the subject matter in the notice." *Starlight International*, 186 F.R.D. at 638. Because the designated deponent could not answer many of the questions "the corporation has failed to comply with its Rule 30(b)(6) obligations." *See id.* Moreover, when Defendant Peterson objected and instructed the designee not to answer questions in the deposition it was in

violation of Federal Rule of Civil Procedure 30 on at least three counts. First, Federal Rule of Civil Procedure 30(d)(1) provides that objections be made "concisely and in a non-argumentative and non-suggestive manner". Second, "no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under Rule 30(b)(6)." *See Starlight International*, 186 F.R.D. at 639. Therefore, even assuming arguendo that the State's inquiry was not covered by its 30(b)(6) notice (which is incorrect), the designee was under an obligation to answer if he knew the answer. And third, under Federal Rule of Civil Procedure 30(d)(1), instructions not to answer may be given "only when necessary to preserve a privilege, to enforce a limitation directed by the court or to present a motion under Rule 30(d)(4)."

V. Conclusion

WHEREFORE, in light of the foregoing, this Court should enter an order compelling Defendant Peterson Farms, Inc. to produce a properly prepared 30(b)(6) designee for deposition and to allow full questioning of that designee, as well as awarding all such other relief in favor of the State as is appropriate.

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